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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1972

No.....

BREZINA CONSTRUCTION CO., INC.,
a corporation, and NIELSEN SCOTT CO., INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 27, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported. The judgment and opinion of the Court of Appeals for the Tenth Circuit was made and entered on July 27, 1972, and a copy is appended to this petition (Appendix A).

The Memorandum Decision and Order of the United States District Court for the District of Utah, Central Division, dismissing the third party claims are appended to this petition (Appendix B).

JURISDICTION

Jurisdiction is invoked under 28 USCA. 1254(1), which statutory provision is believed to confer on this Court jurisdiction to review the judgment below.

QUESTIONS PRESENTED FOR REVIEW

The District Court and the Court of Appeals held that the decisions of this Court in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 120, 76 S.Ct. 232 (1956) and *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 78 S.Ct. 438 (1958) were applicable to only maritime cases and that the principles enunciated in those decisions would not apply to non-maritime cases. The question presented by this Petition is:

1. Are the principles of *Ryan* and *Weyerhaeuser* limited to maritime cases or are they applicable also to non-maritime cases?

STATEMENT OF THE CASE

This is a diversity case.

On December 28, 1965, Third Party Plaintiff, Brezina Construction Co., Inc. (hereafter referred to as Brezina) entered into a written contract with the United States by the terms of which Brezina was required to do certain remodeling work on Building 1219, among others, Hill Air Force Base, Utah. Deseret Architects & Engineers under a written contract with the United

States prepared detailed plans and specifications for the remodeling of said warehouses. The plans and specifications provided for a pull-down access stairway in the ceiling to permit access into the area above the ceiling where equipment was installed. (Ex. 16, 17, 18, 19, 20, 21) Brezina entered into a written subcontract with the Third Party Plaintiff, Nielsen Scott Co., Inc. (hereinafter referred to as Nielsen) by the terms of which Nielsen was required to and did install said access stairway as called for by the plans and specifications. (R. 65-6)

On or about March 8, 1967, Richard E. Barr, the plaintiff, was on active duty with the United States Air Force and was stationed at Hill Air Force Base, Utah. On said day as a part of his regular duties he was in Building 1219 making an inspection of certain equipment installations above the ceiling. He obtained access to the ceiling area by using the access stairway that had been installed by Nielsen. The access stairway was installed as per plans without a platform or a guardrail at the head of them. After plaintiff, Richard E. Barr, completed his inspection tour, he was in the process of attempting to get on the stairway to descend to the floor below when he allegedly caught his foot on a bolt or in some manner lost his balance causing him to fall through the ceiling to the concrete floor below. As a result of said fall, plaintiff received serious and permanent injuries. After the accident, the Air Force installed a platform and guardrail at the head of the stairs. (Ex. 21)

This action was commenced by plaintiff to recover damages for the injuries he received in said accident.

Among other things, plaintiff alleged that the access stairway was defectively designed in that it did not have a platform or a guardrail at the head of it. (R. 59-63).

Brezina and Nielsen filed Third Party Complaints against the United States claiming among other things that the plans and specifications alleged to be defective were furnished by the United States and that it knew or should have known of the dangerous design of the stairway in that it did not have a platform or a guardrail at the head of it (Atkinson Dep. 26-29) and in addition Brezina and Nielsen claim that during the course of construction and prior to the plaintiff's accident, that they specifically called to the attention of the United States the fact that the stairway was so designed as to create a dangerous condition and requested permission to correct the dangerous condition by installing a platform and a guardrail at the head of the stairway. The United States refused this request and instructed Brezina and Nielsen to install the same in the manner that they were in fact installed. (R. 64-7).

Immediately prior to the trial of the case Brezina, Nielsen, and the architects paid plaintiff $60,000.00 in settlement of all of his claims. Of that amount Brezina paid $22,500.00 and Nielsen paid $22,500.00.

It is the position of Brezina and Nielsen that they have a right of indemnity against the United States for the amounts they paid plaintiff in settlement of plaintiff's claim. The trial court dismissed the Third Party Complaints against the United States on the following grounds:

(1) That since plaintiff was a member of the

armed forces on active duty at the time of injury and therefore could not recover from the United States under the Tort Claims Act, such action being precluded by *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950), that it follows there could be no right of recovery by Brezina and Nielsen against the United States on the theory of indemnity.

(2) That the principles of *Ryan* and *Weyerhaeuser* as to implied indemnity had application only in a maritime case and therefore were not applicable in this case.

As to the first ground for dismissal of the third party claims, the Tenth Circuit disagreed with the trial court and held that the exclusive remedy under *Feres* of a serviceman against the government did not preclude a third party (Brezina and Nielsen) from seeking indemnity against the government and that the reasoning of the *Ryan* body of law was applicable so that a third party seeking indemnity is not barred at the threshold.

As to the second ground for dismissal, the Court of Appeals affirmed the trial court and held that the principles of *Ryan* and *Weyerhaeuser* had application only to maritime claims and therefore were not applicable to the case at bar. We submit that the Supreme Court decisions of *Ryan* and *Weyerhaeuser* hereinafter discussed are a complete answer to the lower court's ruling and that the principles of *Ryan* and *Weyerhaeuser* are applicable and are controlling in this case.

REASONS FOR GRANTING WRIT

This Court should review the decision below for the following reasons:

1. The Court of Appeals for the Tenth Circuit has decided a federal question in a way that is in conflict with applicable decisions of this Court.

2. There is a conflict in the decisions of the Court of Appeals for the Tenth Circuit and Fifth Circuit and the Court of Appeals for the Fourth Circuit in that the Tenth and Fifth Circuits hold that *Ryan* and *Weyerhaeuser* are applicable only in admiralty areas whereas the Fourth Circuit holds they apply also in non-maritime cases.

POINT I.

THE HOLDINGS OF THIS COURT IN RYAN AND WEYERHAEUSER APPLY TO NON-ADMIRALTY CASES.

In *Ryan* a stevedoring contractor entered into a formal stevedoring contract with Pan-Atlantic which did not contain an express indemnity provision. An employee of Ryan was injured when part of the cargo broke loose aboard a Pan-Atlantic ship, which cargo had been negligently secured by other employees of Ryan. The employee sued Pan-Atlantic for his personal injuries, and Pan-Atlantic then sought indemnity against Ryan. This court held that the exclusive remedy of the Longshoremen's Act did not preclude suit by a third party against the employer, Ryan.

The Tenth Circuit in the instant case held that the reasoning of the Ryan body of law was applicable and Brezina and Nielsen who had paid money to the

serviceman Barr who was injured while on active duty in the performance of his duty were not precluded from seeking indemnity by reason of the exclusive compensation remedy of the serviceman.

This Court held that the stevedoring contract entered into between Ryan and Pan-Atlantic contained an implied agreement on the part of Ryan to perform the stevedoring activities with reasonable safety. The Court then further held that Ryan had breached this implied agreement and that this breach gave rise to an implied right of indemnity against Ryan for damages paid by the shipowner to Ryan's employee. In essence, the Court implied two contracts on the basis of the relationship of the parties: (1) the implied warranty to perform services in a workmanlike manner, and (2) an implied agreement of indemnity for the breach of warranty. This Court in so holding said:

> "The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consentual obligation owing to the shipowner to stow the cargo in a reasonably safe manner."

The holding of *Ryan* is controlling in the case now before this Court. In *Ryan* there was a contract between the stevedore company and the shipowner for the stevedore company to stow the cargo. This Court implied an agreement on the part of the stevedore company that it would use reasonable care in so doing. In the case now before this Court, Brezina had a contract with the United States under the

terms of which the United States was obligated to furnish Brezina with plans and specifications for the remodeling work. Here, as in *Ryan*, this should imply an agreement on the part of the United States to furnish plans and specifications that are free from design defects and in the event of a breach of this duty to save the contractor (Brezina) harmless from the United States failure to do so. It was because of the defective plans and specifications furnished by the United States that Brezina and its subcontractor Nielsen incurred liability to the plaintiff. The Government further compounded its breach of duty to furnish defect free plans and specifications by refusing, after the defective and unsafe condition was brought to its attention by Brezina and Nielsen, to permit the contractors to construct a platform and guard rail at the head of the stairway so as to render it unsafe. The Government should, since it furnished defective plans in the first place, in violation of its duty and since it refused to permit the elimination of the hazardous condition and ordered the contractor to do the work as per plans and specifications, be required to indemnify the contractors for the loss they sustained by reason of the plaintiff's injuries occasioned by the defective plans.

Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 78 S.Ct. 438 (1958) was a case where plaintiff as owner of a steamship entered into a stevedoring contract with defendant Nacirema. One of the defendant's employees injured while unloading a ship, brought an action against Weyerhaeuser, and Weyerhaeuser sought to obtain indemnity from Nacirema for damages payable to

the injured employee. The Court held for Weyerhaeuser, finding that an implied warranty existed on the part of defendant to perform its duties with reasonable safety, which warranty defendant breached, thereby subjecting itself to a cause of action for indemnity. The primary significance of this case lies in the court's holding that the indemnitee's negligence will not preclude indemnity. Evidence existed in that case that Weyerhaeuser itself was negligent in causing the injuries to Nacirema's employee. The Supreme Court nevertheless held that the breach of the implied warranty on the part of Nacirema would not be defeated by Weyerhaeuser's own negligence. The Court further stated that in the area of contractual indemnity the application of distinctions based on active and passive as well as primary or secondary negligence were inappropriate.

For other decisions of this Court extending or applying the *Ryan* rule see *Crumady v. Jaochim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445 (1959); *Waterman S.S. Corporation v. Dugan & MacNamara, Inc.*, 364 U.S. 421, 81 S.Ct. 200 (1960); *Italia Societa per Anzioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748 (1964); *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 83 S.Ct. 926 (1963); *Treadwell Construction Co. v. United States*, 372 U.S. 772, 83 S.Ct. 1102 (1963); *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, 328 S.W. 2d 788 (Mo. 1959); cf. *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 178, 15 N.E. 2d 567 (1938).

The Fifth Circuit in several cases, an example

of which is *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, has held that the principles of *Ryan* are applicable only to admiralty cases. The Tenth Circuit in the case now before this Court reached the same result. The Fourth Circuit, however, in *General Electric Co. v. Moretz*, 270 F.2d 780 (1959), *Cert. Denied* 361 U.S. 964, reached a contrary result and held that the doctrine of *Ryan* applied to a non-maritime case. Moretz involved a truck driver who brought an action against a shipper for personal injuries and the shipper made claim against the motor carrier, the truck driver's employer, to recover indemnity. Relying on *Ryan*, the Court concluded that an implied contract of indemnity existed and that the shipper could recover any loss it suffered occasioned by the neglect of the carrier. The Fourth Circuit in reaching this result reviewed *Ryan*, *Weyerhaeuser*, *Crumady* and other decisions of the Supreme Court.

In *Elliott Consolidated School District v. Busboom*, 227 F.Supp. 858 (S.D. Iowa 1964) the court, relying on *Ryan*, allowed indemnity against a contractor, reasoning that in a building and construction contract there was an implied agreement to perform in a workmanlike manner and in accordance with the contract, and that a breach of this implied agreement would justify indemnity. The Appellate Court of Illinois in *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App.2d 534, 165 N.E.2d 346 (1960), relying on *Ryan*, *Weyerhaeuser*, *Nacirema* and *Crumady* held there was an implied obligation on the part of a contractor to perform the work in a reasonably safe manner and for the breach of which there was an im-

plied obligation of indemnity. To the same effect see *City of Ft. Scott v. Penn Lubric Oil Co.* 252 P. 268 (Kan. 1927); *Bower & Johnson Construction Co. v. White*, 255 F.2d 482 (5th Cir. 1958); *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W. 2d 559 (Iowa 1962).

In reading the *Ryan* line of cases, there is nothing in the opinions of the Supreme Court that indicates an intent to restrict the doctrine of those cases to admiralty situations. The principle in *Ryan* that a stevedoring contractor impliedly agrees to do his work in a workmanlike manner and that if he breaches such implied warranty that he impliedly agrees to indemnify the shipowner for any damage sustained by the shipowner applies with equal force whether it be an admiralty situation, as in *Ryan*, or a shipper, motor carrier situation, as in the Fourth Circuit decision of *Moretz*. In the case before this Court the United States in performance of its contractual duty furnished plans and specifications to the contractor, Brezina. As in Ryan, the United States should be held to have impliedly warranted that the plans and specifications were free from defect and for a breach of such implied warranty the United States should be held to respond in damages resulting to the contractor.

The Tenth Circuit decision is contrary to the intent of the Supreme Court in the *Ryan* line of cases. In view of the conflict between the Tenth and Fifth Circuits on the one hand and the Fourth Circuit on the other, this Court should review the decision of the Tenth Circuit and lay at rest once and for all whether *Ryan* is applicable to an admiralty case only or whether it has application in non-admiralty situations.

CONCLUSION

Petitioners respectfully urge this Court to grant certiorari for the reasons stated above.

Respectfully submitted,

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Filed in United States District
Court, District of Utah

Aug. 21, 1972

Andrew John Brennan
Clerk

No. 71-1661

APPENDIX A

JULY TERM — JULY 27, 1972

Before Honorable David T. Lewis, Chief Judge; and Honorable John F. Kilkenny and Honorable William E. Doyle, Circuit Judges.

BREZINA CONSTRUCTION CO., INC., a corporation, and NIELSEN SCOTT CO., INC.

Defendants-Third-Party Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, Clerk
By Helen R. Bartha
Deputy Clerk.

FILED
United States Court of Appeals
Tenth Circuit
July 27, 1972
Howard K. Phillips
Clerk

No. 71-1661

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

JULY TERM, 1972

RICHARD E. BARR,
Plaintiff,

v.

BREZINA CONSTRUCTION CO., INC., a corporation, and NIELSEN SCOTT CO., INC.
Defendants and Third-Party Plaintiffs and Appellants,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION
(D.C. No. NC 63-69)

Glenn C. Hanni of Strong & Hanni for Brezina Construction Co., Inc.

P. Keith Nelson of Hanson, Brandt & Wadsworth (Rex J. Hanson of Hanson, Brandt & Wadsworth, on the brief), for Nielsen Scott Co., Inc.

Glenn J. Mecham, Assistant United States Attorney (C. Nelson Day, United States Attorney, on the brief), for United States of America.

Before LEWIS, Chief Judge, KILKENNY* and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

* Of the Ninth Circuit sitting by designation.

On this appeal the Brezina Construction Company and the Nielsen Scott Company seek reversal of a judgment denying their indemnity claim against the United States which sought recovery of sums paid by them to Barr, the plaintiff, in the original suit. They paid the sum of $45,000.00 to Barr in settelement of his claim for personal injuries allegedly caused by the negligence of the defendants. The theory of appellants in seeking to shift responsibility is that the government furnished plans for the structure built by them which was defective and unsafe, and which was the ultimate cause of the injury to Barr.

The trial court dismissed the third-party complaint, holding that Barr as a serviceman on active duty was precluded from direct recovery against the United States by way of the Tort Claims Act[1] under the doctrine of *Feres v United States*, 340 U.S. 135, 71 S.Ct. 153 (1950);[2] in the light of this, the court further held the third-party plaintiffs to be legally circumscribed by the rights of Barr and thus unable to obtain indemnity against the United States. An alternative holding of the trial court as to why the action over failed was that plaintiffs were guilty of active negligence while the United States was passive in the transaction.

The primary suit in this case was filed by Richard E. Barr against Brezina and Nielsen as a result of injuries which he suffered in a fall down an access stairway which had been installed by Nielsen, subcontractor of Brezina, in Building 1219 of Hill Air Force Base in

1. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.
2. Which case holds that the Military Claims Act, 31 U.S.C. §240 et seq. provides the exclusive remedy for the serviceman injured in line of duty.

Utah. Brezina had entered into a contract for remodeling work which included the subject staircase and had subcontracted the actual installation to Nielsen. The plans and specifications were furnished by the United States.[3]

The plaintiff Barr was shown to have been on active duty with the Air Force at the time of the fall and was at the time engaged in the performance of his duties as an airman. He suffered serious injuries. The deficiencies in the stairway were alleged to have been first in the design — failure to provide a platform or guardrail at the head of the stairway — and, second, in the installation; here there was exposure of bolts protruding above the surface of the 2" x 6" plate to which the stairway was attached.

The third-party complaint maintains, as has been noted that the United States knew of the dangerous design of the stairway and that in fact the defendants-third-party plaintiffs specifically called attention to the design deficiency, but were instructed to continue with construction according to the design.

I.

The *Feres* doctrine limits a serviceman claimant seeking recovery against the United States to his remedy under the Military Claims Act. He cannot pursue the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), because his remedy against the United States under the Military Claims Act is exclusive of all other remedies. But it does not follow that a

3. The plans and specifications had been prepared by the Deseret Architects and Engineers under contract with the United States. Deseret was a party defendant in the original action by Barr, and entered into the settlement terminating that aspect of the litigation; they did not enter into the third-party litigation with which we are here concerned.

defendant-third-party plaintiff who has been subjected to liabiilty by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations.

The Supreme Court in dealing with an analogous situation arising under the Longshoremen's and Harbor Workers' Compensation Act,[4] which Act provides an exclusive remedy in favor of the employee or seaman against his employer, has held that notwithstanding the exclusiveness of this remedy a third-party shipowner may maintain indemnity action against the longshoreman's employer, the stevedoring company, and is not barred from prosecuting such an action by the exclusiveness of the remedy of the longshoreman. See *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 120, 76 S.Ct. 232 (1956); *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 78 S.Ct. 438 (1958); *Treadwell Construction Co. v. United States*, 372 U.S. 772, 83 S.Ct. 1102 (1963).[5]

The Supreme Court has not had occasion to consider whether a third party who has paid money to a serviceman who has been injured while on active duty and while in the performance of his duty is also precluded by the exclusive compensation remedy of the serviceman. The reasoning of the *Ryan* body of law appears applicable so that a party seeking indemnity

4. 33 U.S.C. § 901 et seq.

5. Appellants have mistakenly cited Treadwell as authorizing an implied contract or warranty in government employee compensation cases. We read this per curiam opinion as merely holding that the exclusive remedy of the employee does not prevent a third-party action. We concede that the *Ryan* group of cases is authoritative in non-maritime fields as the law on this issue.

is not barred at the threshold. Merely because the third party can sue, however, does not mean he is sure to recover. The sweep of *Ryan* and *Weyerhaeuser* (assuming for the moment that it applies) is not so broad that it allows a recovery in the present fact situation. In our judgment the trial court's determination that the third-party plaintiffs were not entitled to recover was a correct ruling.

The joint brief of the third-party plaintiffs admits that the instrumentality which caused the injury and which was created by them was dangerous and was known by them to have been dangerous at the time. They write:

> Brezina and Nielsen claim that during the course of construction and prior to the plaintiff's accident, that [sic] they specifically called to the attention of the United States the fact that the stairway was so designed as to create a dangerous condition and requested permission to correct the dangerous condition by installing a platform and a guardrail at the head of the stairway. The United States refused this request and instructed Brezina and Nielsen to install the same in the manner that they were in fact installed.

Thus, while acknowledging that they gave the United States full notice of the danger and thus knew of the hazard, they seek to wash their hands of blame and shift it to the United States. They argue that the government's conduct in ordering them to proceed with the construction while knowing that it would result in a faulty product gave rise to an implied promise or an implied warranty to indemnify in the event of personal injury resulting from the defect.

The appellants' implied contract or implied warranty theory would appear to have been designed and

generated at this appellate level, for it does not appear from the pleadings or the pretrial order or the judge's conclusions that this tack was used at trial. From these papers we gather that appellants were there proceeding on a tort theory. This present contract theory is based on the *Ryan-Weyerhaeuser* cases wherein the shipowners sought indemnity against the respective stevedoring companies for having to pay damages to injured employees of the stevedores. The Supreme Court ruled that there had been indeed an implied warranty from the stevedoring companies to the shipowners in which the former undertook to use care in loading the cargo. Based on the reasoning in these admiralty cases, appellants claim that there exists an implied warranty from the government that the plans furnished by it were sound. They then reason that when they brought to the attention of the government the deficiencies in the plans, showing that construction thereby was certain to result in a hazardous stairway, there arose an implied promise on the part of the government to indemnify or compensate appellants for such damages as they were required to pay for injuries incurred in using the stairway when the government told appellants to proceed with construction according to plan.

II.

Appellants' effort to transplant the *Ryan* body of law so as to make it applicable to our situation fails initially because the facts and posture of the parties are vastly different. Here the government is in much the same position as the shipowner in *Ryan*, whereas the position of appellants is not unlike that of the stevedoring company in *Ryan*. Thus, the roles are reversed and, anomalously, we have in effect the stevedoring com-

pany seeking indemnity against the owner. Therefore, in the present context and posture, appellants are faced with the problem of demonstrating entitlement to indemnity when they are the ones who are directly responsible for the plaintiff Barr's injury.

But quite aside from this obstacle, we are constrained to hold that neither *Ryan* nor *Weyerhaeuser* nor any of the other *Ryan* progeny[6] governs. These cases all arise in the admiralty area, and most courts have refused to apply liberally the concept of implied warranty or implied contract to indemnify in other fields. See, for example, *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1107 (5th Cir. 1970). There the Fifth Circuit thoroughly considered the question and concluded that the right to indemnity had to be governed by state law. It was said in *Monsanto* that the special rules defining the obligations and liabilities of shipowners necessitated the formulation of the *Ryan* doctrine and justified its application.[7]

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6. See *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Waterman S.S. Corp. v. Dugan & MacNamara, Inc.*, 364 U.S. 421 (1960); *Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

7. The court further commented:

> In short, *Ryan* was conceived as an admiralty concept, and its explicatory progeny have not denied its paternal thesis. We find nothing in the wake of *Ryan* to lead us to apply its principles to landlubbers. It is abundantly clear that no tributary of *Ryan* reaches the Brookhaven Oil Field in Lincoln County, Mississippi, which is many miles inland from both the Mississippi River and the Gulf of Mexico.
>
> Consequently, in deciding this issue we cannot distill Mississippi law through a federal sieve, we must completely abandon the admiralty domain and repair to Mississippi's inland terrain. Looking solely to Mississippi's independent jurisprudence, we are unable to find any authority clearly indicating that Mississippi recognizes a *Ryan*-type implied contract of indemnity in a situation such as the case before us. Accordingly, we must conclude that *Monsanto* is not entitled to indemnity on the basis of its contract theory. The trial court's conclusion to the contrary was erroneous. 420 F.2d at 1111.

Our case like *Smith Petroleum* is in its underlying aspect a tort action and thus the reasoning as well as the numerous supporting authorities of *Smith Petroleum* are fully applicable.

Our court has also had occasion to consider the applicable law in another indemnity case in which a somewhat similar attempt was made to subject the United States to liability. This was in *Morris v. Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971). We held that insofar as indemnity was sought on a tort basis, the matter was governed by the law of New Mexico. However, a right to indemnity was also asserted in the Morris case in alleged contract to indemnify. As to this, the court was careful to point out that the liberal warranty recognized in the *Ryan* group of cases was peculiar to the relationship of stevedore and shipowner. The court expressed doubt as to its applicability to fact situations other than cargo handling and unseaworthiness of the vessel, but went on to rule that even if it were applicable, the facts did not give rise in that case to a contractual right in the United States to recover indemnity.

The *Ryan* logic is inapplicable based as it is on the special and unusual relationships and the problems arising therefrom which are peculiar to the shipping industry; federal common law understandably applies in *Ryan* cases. There is no justification, however, for superimposing that body of law on the present controversy, which is a simple indemnity demand growing out of the Federal Tort Claims Act, which is in its substantive aspects essentially governed by state law.

III.

We see no error in the trial judge's approach to the tort problem which was before him, namely, the passive and active role of the tortfeasors as the test, and in our judgment the correct result emerged. We have

no doubt that the court was correctly applying Utah law, and we do not here question the judge's knowledge of it. It seems desirable, though, in view of the expanded contentions of the appellants — we refer to their arguments that an implied warranty or contract emerged from its communications with the government — to discuss the problem somewhat.

It is relevant to consider a more specific test, namely, appellants' proceeding with the construction of the stairway in question notwithstanding their having full knowledge that they were creating a hazard likely to produce harm to one using it. The law of Utah is expressed in *Barrus v. Wilkinson v. St. Paul Fire and Marine Insurance Company of St. Paul, Minnesota*, 16 Utah 2d 204, 398 P.2d 207 (1965). In that case the lessee's employee recovered from the lessor damages for injuries suffered in a hallway of the office building of the lessor. Relying on an indemnity provision in the lease, the lessor sought to recover the damages paid out to the employee from the tenant-lessee, St. Paul Fire and Marine Insurance Company. It was pointed out by the Utah court that the agreement did not clearly express an undertaking to indemnify the defendants-third-party plaintiffs-lessor from their negligent acts and, therefore, since the lessor was shown to have been negligent, it could not recover. A very recent opinion of this court in *Kansas City Power & Light Co. v. United Telephone Co. of Kansas, Inc.*, 458 F.2d 177 (10th Cir. 1972), reached the same result.[8]

The cases are uniform in holding that an indemnity agreement will not be construed so as to create a

8. However, Kansas law was there involved.

right to indemnity for loss resulting from one's own negligence unless the stipulation so to indemnify is clearly and unequivocally set forth in the contract. See *Associated Engineers, Inc. v. Job*, 370 F.2d 633 (8th Cir. 1966), wherein Judge Blackmun, now Mr. Justice Blackmun, gave effect to a clause which promised indemnity even from negligence. In the course of the opinion there it was stated that absent such an explicit contract the negligence of the indemnitee bars his recovery. See also *General Acc. Fire & Life Assur. Corp. v. Finegan and Burgess, Inc.*, 351 F.2d 168 (6th Cir. 1965); *Employers Mut. Liab, Ins. Co. v. Griffin Construction Co.*, 280 S.W.2d 179 (Ky. 1955); *Anthony v. Louisiana & Arkansas Ry. Co.*, 316 F.2d 858 (8th Cir. 1963), cert. den. 375 U.S. 830, 84 S.Ct. 74.

Considered from the standpoint that there was an implied contract or promises to indemnify as urged by appellants, we must again hold that appellants' point is not well taken, for there is not the slightest evidence to support an implied contract or promise on the part of the government to indemnify in the event of injury. In this connection appellants' position is less tenable in view of the difficulty in implying a promise on the part of the government incident to an express written contract.

Appellants' negligence in building a facility which they knew was faulty precludes them on their other claim, that of breach of implied warranty. As we view it, the only available implied warranty is one which warrants fitness or suitability of the plans. An implied warranty of indemnity would be the same thing as an implied contract or promise. The warranty of fitness

fails for lack of reliance. The plans were deficient and appellants knowingly proceeded to build the stairway nevertheless.

The cases hold that indemnity arising from alleged breach of implied warranty will not succeed where, as here, the indemnitee knew of the deficiency and negligently acted in the face of the hazard which has been present *Cf.* Williston on Contracts § 988. See, e.g. *Maryland Casualty Co. v. Independent Metal Products Co.*, 99 F. Supp. 862 (D. Neb. 1951); *Plasikowski v. Arbus*, 92 Conn. 556, 103 A. 642 (Conn. 1918).[9]

In *Horrabin v. City of Des Moines*, 198 Ia. 549, 199 N.W. 388 (1924), the court said:

> One of the tests in determining whether there may be contribution or indemnity in favor of one joint wrongdoer against another is whether the former knew, or must be presumed to have known, that the act for which he has been held liable was wrongful.[10] 199 N.W. at 990.

In summary then appellants' third-party claim is lacking in merit whether it goes forward as a species of tort, as an implied contract, or as a breach of implied warranty. As is pointed out by Dean Prosser, Law of Torts, § 48 at 281, 3rd Ed. 1964, the indemnity action calls for the shifting or transferring of responsibility from the indemnitee to the indemnitor. The author points out that this can come about as a result of the relation of the parties to one another and the consequent duty owed, or because of significant differences in the

9. Plasikowski involved a chauffeur seeking indemnity from his employer for damages resulting from defective brakes. Indemnity there was denied because the chauffeur knew of the hazardous condition.

10. See also "Indemnity Between Negligent Tortfeasors: A proposed Rationale," 37 Iowa Law Review 517, 1952.

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kind or quality or their conduct. In short, the doctrine has an equitable quality.

In the case at bar there is no contract, express or implied. Further, there is no reason in the relationship between the parties, or resulting from significant differences in the conduct of the parties, which would justify the shifting of the burden of liability from appellants to the United States. In sum there is no legal basis discoverable on either land or sea capable of giving rise to liability.

Accordingly, the judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

RICHARD E. BARR,
Plaintiff,

v.

BREZINA CONSTRUCTION CO., INC., a corporation, NIELSEN SCOTT CO., INC., HARRY ROZEMA and RAY AUSTIN, dba ROZEMA & AUSTIN and ROZEMA & AUSTIN, a co-partnership; EMIL FETZER, HENRY P. FETZER, JOHN P. FETZER, HOWELL Q. CANNON, GEORGE W. POULSEN, and GEORGE C. YOUNG, dba DESERET ARCHITECTS & ENGINEERS, a co-partnership,
Defendants.

BREZINA CONSTRUCTION CO., INC., a corporation, and NIELSEN SCOTT CO., INC.,
Third-Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Third-Party Defendant.

No. NC 63-69
MEMORANDUM AND ORDER DISMISSING THIRD-PARTY CLAIMS

The government has moved for a dismissal of third-party claims and the motion has been argued and submitted. The court now deems itself fully advised.

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No express contract for indemnity being claimed and the court perceiving no implied contract from the pleaded facts and the basic background accepted and confirmed by the parties without dispute during oral argument, it is concluded that no right to indemnity exists in view of the absence of any liability on the part of the government to the injured person. *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152. If the apparent division of authority pointed out in the briefs would render this view tenuous, and I think there are significant distinctions between this and the cases relied upon by the third-party plaintiffs, it appears to me that the views expressed by the United States Court of Appeals for the Tenth Circuit in *Titan Steel Corporation v. Walton*, 365 F.2d 542 (10th Cir. 1966), construing Utah law should persuade the court to follow the line of authority disallowing indemnity under the circumstances of this case. Among other things the court says:

> "... [T]he case law draws a clear distinction between liability of a covered employer to a third party arising by operation of law and liability created wholly by independent contract... These judgments rest upon contractual obligations freely and voluntarily assumed, quite apart from any right, duty or obligation arising by operation of law."

But if there is any question as to the first stated grounds, it appears to me that it is both resolved and rendered moot by a second reason for the dismissal. Basically the negligence claimed against the government is essentially of the same quality or type as that on which recovery against the third-party plaintiffs might be obtained. A mere difference in degree, rather

than in the nature or quality of the negligence, would not justify indemnity. If the negligence of the government either in failing to give notice of danger or in discovering the faulty design or otherwise were the sole proximate cause of the injuries in question, the third-party plaintiffs would have a complete defense to the action without any necessity or justification of indemnity. If the third-party plaintiffs were jointly, successively or concurrently negligent by failure to warn of a known danger or otherwise their negligence might be different in degree but not in kind and there could be no recovery of indemnity anyway, as to them liability for failure to provide a safe place to work or some other vicarious liability not being involved. *Hardman v. Matthews*, 262 P.2d 748 (Utah 1953); *Salt Lake City v. Schubach*, 159 P. 2d 149 (Utah 1945); *Cf. Security Insurance Co. of New Haven v. Johnson*, 276 F.2d 182 (10th Cir. 1960); *Safway Rental & Sales Co. v. Albina Engine & Machine Works*, 343 F.2d 129 (10th Cir. 1965). See also *United States v. Acord*, 209 F.2d 709 (10th Cir. 1954).

Accordingly, I am of the opinion that the third-party complaints for indemnity against the United States should be, and they are hereby, dismissed.

Dated this 1st day of February, 1971.

United States District Judge
A. Sherman Christensen